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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

UPTOWN NEWPORT JAMBOREE, LLC, Plaintiff and Respondent, v. NEWPORT FAB, LLC, Defendant and Appellant.	G056414 (Super. Ct. No. 30-2018-00973247) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Theodore R. Howard, Judge. Affirmed.

Skadden, Arps, Slate, Meagher & Flom, Jason D. Russell, Hillary A. Hamilton, Adam K. Lloyd; Keller/Anderle and Jennifer L. Keller for Defendant and Appellant.

Snell & Wilmer, William S. O'Hare, Todd E. Lundell and Jing (Jenny) Hua for Plaintiff and Respondent.

* * *

INTRODUCTION

California's anti-SLAPP statute, Code of Civil Procedure section 425.16, authorizes a special motion to strike a cause of action "arising from any act . . . in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution."[1] Our focus in this opinion is on the meaning and scope of the term "arising from" in section 425.16(b)(1). We conclude the challenged cause of action does not arise from activity claimed to be constitutionally protected and therefore affirm the trial court's order denying the anti-SLAPP motion brought by defendant and appellant Newport Fab, LLC dba Jazz Semiconductor (Jazz).

This is a commercial lease dispute. The landlord, Uptown Newport Jamboree, LLC (Uptown), filed a complaint against its tenant, Jazz, seeking a declaration whether Jazz was in breach of the lease by not meeting relevant noise restrictions imposed by agreement and by law, and by not performing sound mitigation work at the leased property. Jazz responded with an anti-SLAPP motion. Jazz contended the declaratory relief cause of action arose from protected petitioning activity, which, according to Jazz, was its email communications with the City of Newport Beach (the City) regarding relevant noise level standards and activities in seeking and obtaining permits for the sound mitigation work.

Uptown's declaratory relief cause of action does not arise from the activity claimed by Jazz (and assumed by us) to be protected under section 425.16(e). Jazz's email communications with the City and the process of obtaining permits are not themselves the wrongful conduct for which Uptown seeks relief. Uptown does not assert

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[1] SLAPP is an acronym for "strategic lawsuit against public participation." (*Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637, 639.) All code references are to the Code of Civil Procedure, unless otherwise noted. We refer to section 425.16, subdivision (b)(1) as section 425.16(b)(1) and section 425.16, subdivision (e) as section 425.16(e).

Jazz breached the lease by undertaking any of those activities. They might be collateral or incidental to the declaratory relief cause of action but are not the basis of it.

As we are affirming the order denying Jazz's anti-SLAPP motion on the ground Uptown's claim did not arise from alleged protected activity, we do not address whether Uptown satisfied its burden of establishing a probability of prevailing on the merits.

BACKGROUND

I.

Allegations of the First Amended Complaint

The First Amended Complaint, which is verified, alleges:

Uptown is the landlord and Jazz is the tenant under a lease of real property in the City (the Lease). Jazz owns and operates a semiconductor fabrication factory on the property subject to the Lease (the Leased Premises).

In February 2013, Uptown obtained entitlements from the City to develop a 25.05-acre parcel into a planned community to include about 1,244 residential units, 11,500 square feet of retail commercial space, and 2.05 acres of public parks. The Leased Premises occupy what would become a portion of phase 2 of the residential development.[2]

In connection with the City's approval of the residential entitlements, the City certified an environmental impact report (EIR) under the California Environmental Quality Act. (Pub. Resources Code, § 21000 et seq.) Among other issues, the EIR addressed the impacts of noise coming from Jazz's manufacturing facility on the future

[2] The Phasing Plan prepared by Uptown and submitted to the City states, "[e]xisting on-site land uses are allowed to continue as nonconforming uses in compliance with Newport Beach Municipal Code . . . Chapter 20.38." The Land Uses, Development Standards & Procedures prepared by Uptown and submitted to the City states, "existing industrial development" is "an allowed interim use" subject to the City's Municipal Code "until the existing . . . [L]ease expires or until March 2027, whichever occurs first."

residents of phase 1 of the development. "To address this impact, the City adopted a Mitigation Monitoring and Reporting Program ('MMRP'), which requires [Jazz] to demonstrate that noise levels at Phase I of the Uptown Newport development do not exceed certain specified levels, as a condition to the City's issuance of building permits required to commence construction in Phase I."

In October 2013, Uptown and Jazz entered into a seventh amendment to the Lease (the Seventh Lease Amendment) to address, among other things, sound mitigation. The Seventh Lease Amendment stated that Jazz's occupancy under the Lease was subject to three limitations of exterior noise levels generated by Jazz's manufacturing activities: (1) A recorded Sound Mitigation Agreement[3] (a private restriction encumbering the Leased Premises); (2) the City's Municipal Code;[4] and (3) Mitigation Measure 10-3[5] contained in the Mitigation Monitoring and Reporting Program adopted by the City.

The Seventh Lease Amendment required Jazz to implement sound mitigation measures "so as [to] reduce the loudness of sounds generated from the Leased Premises . . . so as to be fully compliant with all applicable Maximum Permitted Noise

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[3] The Sound Mitigation Agreement required, among other things, that noise generated by Jazz not exceed 60 dBA as measured at the entrance to the office building at 4220 Von Karman Avenue. The abbreviation "dBA" means "A-weighted" decibel. A decibel level that has been "A-weighted" deemphasizes low and high frequencies to better correspond with the subjective reactions of people to noise.

[4] Under the City's Municipal Code, noise generated by Jazz at the Leased Premises may not exceed 60 dBA Leq between 7:00 a.m. and 10:00 p.m. and 50 dBA Leq between 10:00 p.m. and 7:00 a.m., for residential portions of mixed use properties. (Newport Beach Mun. Code, ch. 10.26.025(a).) The abbreviation "Leq" stands for "energy equivalent level." It is the steady noise level which has the same total sound energy as the actual, fluctuating noise levels over the relevant time period.

[5] Mitigation Measure 10-3 requires noise levels to not exceed 65 dBA CNEL at all exterior living areas, at the Jazz property boundary, or where the nearest person may be present. The abbreviation "CNEL" stands for "Community Noise Equivalent Level." It is the Leq of the A-weighted noise levels over a 24-hour period, with a 10 dB penalty added to noise level between 10:00 p.m. and 7:00 a.m., when people are more sensitive to noise.

Levels, but in all events so that the exterior noise levels do not exceed 65 decibels (A-weighted)" measured at the boundary between Jazz's facility and an adjoining parcel. In the Seventh Lease Amendment, Jazz agreed to (1) pursue and complete pre-implementation activities (such as obtaining required permits) in order to begin implementation of sound mitigation measures no later than December 31, 2014, (2) begin on-site implementation of sound mitigation measures no later than January 15, 2015, and (3) complete implementation of all sound mitigation measures no later than September 30, 2015.

The Seventh Lease Amendment states, "[t]he Sound Mitigation Work shall be performed pursuant to permits issued by the City of Newport Beach (and any other applicable governmental agency) in compliance with all Laws, by a licensed, bonded contractor, selected by Tenant."

In exchange for Jazz's agreement to timely "pursue and complete each stage of the Sound Mitigation Work," Uptown agreed to "defer declaring a breach of the Lease by reason of any possible noise violation." The Seventh Lease Amendment stated, "Tenant's failure to accomplish the required portion of the Sound Mitigation Work as described above by the applicable Performance Date for such portion, will constitute a material, non-curable breach of the Lease, entitling Landlord to declare a termination of the Lease."

In May 2015, Jazz informed Uptown that Jazz anticipated it would not be able to complete the sound mitigation work by the agreed-upon completion date of September 15, 2015 and requested an extension of time to complete the work. To accommodate that request, Uptown and Jazz entered into an eighth amendment to the Lease (the Eighth Lease Amendment) which extended the deadline for completing the sound mitigation work to June 30, 2016.

Uptown contends that "from 2016 to the present the noise levels generated by [Jazz]'s activities within the Leased Premises have exceeded the noise levels

permitted under the Lease" and that Jazz "did not perform all of the measures required to complete the Sound Mitigation [W]ork by the June 30, 2016, deadline." Uptown alleged that Jazz breached the Lease by failing to do the following: (1) meet the 60 dBA Leq daytime standard under the City's Municipal Code; (2) meet the 50 dBA Leq nighttime standard; (3) meet the 65 dBA CNEL noise standard under Mitigation Measure 10-3; (4) perform sound mitigation measures specified in Mitigation Measure 10-3 as necessary to meet its noise standards; (5) conduct annual noise measurements required under the Sound Mitigation Agreement; and (6) comply with its obligation to ensure that exterior noise levels generated by Jazz's activities do not exceed 65 dBA.

The only cause of action asserted in the First Amended Complaint is for declaratory relief. Uptown seeks a declaration that Jazz failed to perform the Sound Mitigation Work set forth in the Seventh Lease Amendment (as modified by the Eighth Lease Amendment), such failure to perform constitutes a material breach of the Lease, and since June 30, 2016 Jazz has been obligated not to permit noise levels to exceed the maximum noise levels permitted by the Sound Mitigation Agreement, the City's Municipal Code, and Mitigation Measure 10-3.

The First Amended Complaint includes this allegation: "No relief is sought and no claim is asserted by Plaintiff based upon (i) Defendant's requests for action, permits or permission from (whether granted or refused), communications with, or statements made to, the City of Newport Beach, any other governmental authority or in any other official proceeding authorized by law, or (ii) any statement made by Defendant in any public forum concerning any issue of public interest, including but not limited to any such matters pertaining to the development of the Uptown Newport Property. Rather, relief is sought based solely upon the parties' rights and obligations under the Lease and Defendant's breaches of the Lease, including Defendant's failure to timely complete the Sound Mitigation Work, and the generation of noise from Defendant's activities that exceeds the noise levels permitted under the Lease."

II.

Evidence of Protected Activity

In support of the anti-SLAPP motion, Jazz submitted evidence of two categories of communication and conduct which it contends constitute protected activity within the meaning of the anti-SLAPP statute.

First, in June and early July 2014, Jazz's counsel exchanged email communications with Rosalinh Ung, an associate planner in the planning division of the City's Community Development Department, to confirm permitted noise level standards and mitigation measures for the Uptown Newport Development Plan. Ung confirmed that Jazz's semiconductor plant was a Zone IV use under the City Municipal Code and therefore was restricted to an exterior noise level of 70 dBA.

Second, in the fall of 2014, after consultation with noise mitigation experts, Jazz developed a plan for mitigating sound (the Sound Mitigation Plan) and presented that plan to Uptown. At the same time, Jazz sought permits from the City in order to begin work on the Sound Mitigation Plan. Jazz submitted designs for the Sound Mitigation Plan to the City. The City returned the plans with "Planning Department Notes" stating: "Prior to the final issuance of a building permit, an independent noise certification shall be provided to validate [the] noise level at the nearest property boundary of future Uptown Newport Phase 1 Residential Development is measured at 65 dBA Leq or lower." The City issued two combination permits in December 2014 for the Sound Mitigation Plan.

Jazz submitted its plans and the Planning Department Notes to Uptown for approval in compliance with the Seventh Lease Amendment. Uptown confirmed it had "'no further comments on the plans'" and Uptown did not raise any objections to 65 dBA Leq standard mentioned in the Planning Department Notes.

Jazz began on-site implementation of the Sound Mitigation Plan sometime before January 8, 2015 and completed it in November and December of the same year.

To obtain the City's approval of the completed Sound Mitigation Plan, Jazz submitted an independent noise certification from its consultants, which determined that "all property line locations meet the 65 dBA requirement." The City issued final permits on November 19 and December 16, 2015.

JAZZ'S Anti-SLAPP MOTION

Jazz brought a special motion to strike the First Amended Complaint under the anti-SLAPP statute. Jazz asserted that complaint was "based on Jazz's petitioning efforts in an official proceeding—obtaining City permits and approval of the sound mitigation measures [that Uptown] claims are incomplete—and thus is an impermissible SLAPP." Uptown opposed the motion.

The trial court denied the anti-SLAPP motion on the ground that Uptown's claim "doesn't arise out of the protected activity." The court stated orally at the hearing: "Here the plaintiff is seeking declaratory relief on one issue, whether defendant has breached the lease by not meeting the mandated sound limitations. Defendants' conduct of potentially breaching the lease is the gravamen of the claim, not that it filed permits and proceedings with the city as part of its obligations under the lease. Accordingly, the declaratory relief cause of action to determine if there has been a breach of contract is not based upon protected activity." Jazz timely appealed.

DISCUSSION

I.

Background Law and Standard of Review

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has

established that there is a probability that the plaintiff will prevail on the claim." (Section 425.16(b)(1).)

"The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity. Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. We have described this second step as a 'summary-judgment-like procedure.' [Citation.] The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.] '[C]laims with the requisite minimal merit may proceed.'" (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385, fn. omitted.)

"We review an order granting or denying an anti-SLAPP motion under the de novo standard and, in so doing, conduct the same two-step process to determine whether as a matter of law the defendant met its burden of showing the challenged claim arose out of protected activity and, if so, whether the plaintiff met its burden of showing probability of success." (*Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 42 (*Newport Harbor*).)

II.

Uptown's Declaratory Relief Cause of Action Did Not Arise From Activity Asserted by Jazz to Be Protected.

A. *Preliminary Considerations*

"At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them." (*Baral v. Schnitt, supra,* 1 Cal.5th at p. 396.) The defendant must demonstrate the activity alleged falls within one of the four categories described in section 425.16(e).[6] (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 620 (*Rand*).)

Jazz identifies the allegations of protected activity as (1) the email communications between Jazz's counsel and Ung, the associate planner for the City, regarding permitted noise standards and mitigation measures,[7] and (2) the process by which Jazz submitted plans to the City and sought and obtained permits to implement the Sound Mitigation Plan. Jazz argues the email communications are protected activity within the meaning of section 425.16(e)(4) and the process for obtaining permits is protected activity within the meaning of section 425.16(e)(1) and (2).

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[6] The four categories are: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16(e).)

[7] Jazz repeatedly characterizes its email communications with the associate city planner as a "petition" to the City or "petitioning conduct." (See, e.g., Appellant's Opening Brief, pp. 16, 27.) Rather than accept or reject that characterization, we treat the email communications as what they are, presuming for purposes of analysis they are protected within the meaning of section 425.16(e).

We accept, for purposes of analysis, Jazz's argument the identified activity is protected within the meaning of section 425.16(e) and turn to the issue whether Uptown's declaratory relief cause of action *arises from* those activities. Before doing so, we address Jazz's argument that the trial court made oral statements demonstrating it legally erred by imposing an "intent to chill" requirement and by holding breach of contract claims are exempt from anti-SLAPP scrutiny. The short response to that argument is that an order on an anti-SLAPP motion is reviewed de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326; *Newport Harbor, supra,* 23 Cal.App.5th at p. 42.) "We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*).) Thus, the trial court's oral comments, even if erroneous, would not warrant reversal if our independent review of the order leads us to conclude the result is correct. (See *Esslinger v. Cummins* (2006) 144 Cal.App.4th 517, 523 [declining to consider the trial court's oral comments to construe the order entered]; *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1451 ["Because we review the correctness of the order, and not the court's reasons, we will not consider the court's oral comments or use them to undermine the order ultimately entered"].)

We feel obliged nonetheless to point out that the trial court said nothing to suggest it denied Jazz's anti-SLAPP motion by imposing an intent to chill requirement or by holding that contract claims are beyond the anti-SLAPP statute. We agree with Uptown that Jazz pulls isolated statements made by the trial court and misconstrues them out of context. The trial expressly and quite plainly stated that any allegations of protected activity were "only incidental" to the declaratory relief cause of action, the gravamen of which was "based on non-protected activity."

Jazz also contends the trial court failed to address specific allegations to determine whether they arose from protected activity. But Jazz did not move to strike

specific allegations from the First Amended Complaint; Jazz moved only to strike the entire complaint. (See *Newport Harbor, supra,* 23 Cal.App.5th at pp. 44-45.) Because we conclude Uptown's declaratory relief cause of action does not arise from any allegation of protected activity, there would be no need to address specific allegations.

B. *Jazz's Allegedly Protected Activities Do Not Form the Basis for Uptown's Claim Or Are Themselves the Wrongful Conduct Complained of.*

A claim arises from protected activity within the meaning of section 425.16(b)(1) if the activity underlies or forms the basis for the claim. (*Park, supra*, 2 Cal.5th at p. 1062; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78-79.) "Critically, 'the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech.'" (*Park, supra*, 2 Cal.5th at p. 1063.) "In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Ibid.*; see *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 ["In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity"].)

In *Park*, the plaintiff, a tenure-track assistant professor at California State University, sued the university's board of trustees (the defendant) for discrimination under the California Fair Employment and Housing Act after he was denied tenure. (*Park, supra,* 2 Cal.5th at p. 1064.) The defendant moved to strike the complaint under the anti-SLAPP statute. The defendant argued the lawsuit arose from its decision to deny the plaintiff tenure and the communications that led up to and followed that decision, and those communications were protected activities. (*Ibid.*) The trial court denied the anti-SLAPP motion and the Court of Appeal reversed. (*Ibid.*) The California Supreme Court reversed the Court of Appeal because the protected communications were not themselves the wrong complained of or the basis for the claim. (*Id.* at pp. 1060, 1061.)

The Supreme Court clarified and explained the requisite nexus between the protected activity and the claims challenged by an anti-SLAPP motion. The court emphasized the distinction between "activities that form the basis for a claim" and activities "that merely lead to the liability-creating activity or provide evidentiary support for the claim." (*Park, supra*, 2 Cal.5th at p. 1064.) "[A] claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Id.* at p. 1060.) The plaintiff claimed he was denied tenure due to his national origin; none of the elements of that claim depended on any of the protected communications or activities. (*Id*. at p. 1068.) "The tenure decision may have been communicated orally or in writing, but that communication does not convert [the plaintiff]'s suit to one arising from such speech. . . . As the trial court correctly observed, [the plaintiff]'s complaint is 'based on the act of denying plaintiff tenure based on national origin. Plaintiff could have omitted allegations regarding communicative acts or filing a grievance and still state the same claims.'" (*Ibid.*)

Here, Jazz's allegedly protected activities neither form the basis for Uptown's claim nor are themselves the wrongful conduct complained of. Uptown's complaint for declaratory relief in effect is a claim for breach of contract, the elements of which are (1) the existence of a contract, (2) plaintiff's performance, (3) defendant's breach, and (4) damages resulting from the breach. (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 402.) Uptown alleges Jazz breached the Lease by not performing the sound mitigation measures set forth in the Seventh Lease Amendment and by permitting noise levels to exceed those permitted by the Sound Mitigation Plan, the City Municipal Code, and Mitigation Measure 10-3. Jazz's email communications

with the City's associate planner and the process of obtaining permits are not themselves the wrongful conduct for which Uptown seeks relief. The fact Jazz had to obtain permits or that the sound mitigation measures had to be performed pursuant to the permits does not mean Uptown's declaratory relief cause of action arose from Jazz's conduct.

Uptown could have omitted—and did omit—allegations of those activities and still state its claim for declaratory relief. Uptown went one step further and included in the First Amended Complaint an allegation disclaiming any relief based on protected activity. The plaintiff in *Central Valley Hospitalists v. Dignity Health* (2018) 19 Cal.App.5th 203, 209, 217 included in its complaint for business torts a similar-type allegation expressly excluding any claim arising from privileged peer review activities (which might be subject to an anti-SLAPP motion). The Court of Appeal affirmed the trial court's order denying the defendant's anti-SLAPP motion because the claims did not arise from protected activity. (*Id.* at pp. 217-218.) In addition, the Court of Appeal noted that the plaintiff "expressly excluded peer review from the complaint." (*Id.* at p. 217.) Using strong language, the court suggested the anti-SLAPP motion an was attempt to "[i]gnore what was pleaded." (*Id*. at p. 218.)

Uptown's allegation expressly disclaiming any claim based on protected activity tends to support the trial court's order denying Jazz's anti-SLAPP motion. But we do not address the validity or legal effect of that allegation because, with or without it, the claim asserted by Uptown does not arise from activity protected within the meaning of section 425.16(e).

Uptown does not allege any liability on Jazz's part for communicating with the City about noise level standards or for seeking permits. Evidence of that activity might be relevant to establish the noise level restrictions and mitigation standards to which Jazz was subject pursuant to the terms of the Lease and the Seventh Lease Amendment. Jazz argues it had to engage in such communications with the City to understand its obligations under the Lease and the Seventh Lease Amendment, which

refer to compliance with notice standards set forth in the City Municipal Code. Even if that were the case, Jazz's activities would have "merely le[]d to the liability-creating activity or provide[d] evidentiary support for the claim." (*Park, supra,* 2 Cal.5th at p. 1064.) Uptown does not allege those communications or activities themselves form the basis for the claim, constituted a breach of the Lease, or caused Uptown to suffer damages.

Rand, supra, 6 Cal.5th 610, also supports our conclusion that Uptown's claim does not arise from protected activity.[8] In *Rand,* the defendant, the City of Carson (the defendant city), hired the plaintiffs as its agents to negotiate with the National Football League (NFL) about building a stadium in the city. (*Id.* at p. 617.) The defendant city's contract with the plaintiffs was for two years, with an option to renew, and had an exclusivity provision. (*Ibid*.) Renewal of the agreement was within the defendant city's discretion; however, the plaintiffs alleged the defendant city attorney made representations that the defendant would extend the agreement for two years. (*Ibid.*) Some two years after the attorney made that representation, the defendant city council (the city council) considered whether to renew the contract. (*Id.* at pp. 617-618.) The plaintiffs alleged that, within the agreement's initial term, the defendant city breached the exclusivity provision by engaging a rival developer, Leonard Bloom, to act as its representative in negotiating with the NFL. (*Id.* at p. 618.) The plaintiffs' complaint alleged causes of action for breach of contract, tortious breach of contract, and promissory fraud against the defendant city; fraud against the defendant city and Bloom; and intentional interference with contract and intentional interference with prospective economic advantage against Bloom. (*Id.* at p. 619.)

The trial court granted a special motion to strike all but the breach of contract cause of action. (*Rand, supra*, 6 Cal.5th at p. 619.) The Court of Appeal

[8] *Rand* was issued after briefing in this appeal had been completed. In response to our invitation, Uptown and Jazz each submitted a letter brief addressing *Rand.*

reversed, concluding the plaintiff's causes of action did not arise from conduct in furtherance of the defendants' constitutional rights of free speech in connection with a public issue. (*Ibid.*)

The California Supreme Court, affirming in large part the Court of Appeal, examined the statements and activities forming the basis for the plaintiffs' claims to determine whether they constituted protected activity within the meaning of section 425.16(e)(2) or (4). (*Rand, supra*, 6 Cal.5th at pp. 615-616.) Those statements included communications between Bloom and NFL representatives and between Bloom and representatives of the defendant city, and representations made to the plaintiffs by the defendant city's mayor and attorney. (*Id.* at pp. 622, 629.) The Supreme Court concluded the statements and representations, except for the statements made by Bloom, did not come within section 425.16(e)(2) because they were unrelated to the issue considered by the defendant city council or were made long before the issue of contract renewal came "'under consideration or review'" by the defendant city council. (*Rand, supra*, at p. 623.) Those statements and representations did not come within section 425.16(e)(4) because, while the issue of building a stadium in the defendant city was of public concern, the issue of who should represent the defendant city in negotiations with the NFL was not. (*Rand, supra*, at pp. 625-626.)

In contrast, the statements made by Bloom to representatives of the defendant city came with section 425.16(e)(2) because at the time they were made the issue of contract renewal was under consideration or review by the defendant city. (*Rand, supra*, 6 Cal.5th at p. 629.) The statements made by Bloom to NFL representatives came within section 425.16(e)(4) because they were made in connection with the public issue of bringing a professional football franchise to the defendant city. (*Rand, supra*, at pp. 629-630.) The plaintiff's intentional interference claims arose directly out of those protected communications because they constitute the very conduct

by which the plaintiffs claimed to have been injured in their intentional interference claims. (*Id.* at p. 630.)

Although *Rand* deals primarily with the issue whether particular statements were protected under section 425.16(e)—an issue which we do not address—it does offer guidance on and insight into determining whether Uptown's claim *arises from* Jazz's communications with the City. On the requirement that a claim arise from protected activity to be subject to an anti-SLAPP motion, the *Rand* court stated: "But to prevail on an anti-SLAPP motion, a defendant must do more than identify some speech touching on a matter of public interest. As we have explained, '"the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech."' [Citation.] In other words, a claim does not 'arise from' protected activity simply because it was filed after, or because of, protected activity, or when protected activity merely provides evidentiary support or context for the claim. [Citation.] Rather, the protected activity must 'supply elements of the challenged claim.'" (*Rand, supra*, 6 Cal.5th at p. 621, quoting *Park, supra*, 2 Cal.5th at pp. 1063, 1064, 1066.) The anti-SLAPP statute must be read broadly, "[b]ut we do not understand it to swallow a person's every contact with government, nor does it absorb every commercial dispute that happens to touch on the public interest." (*Rand, supra*, at p. 630.)

Rand's significance to this case goes beyond general legal propositions. The defendant city in *Rand* suggested the promissory fraud claim was subject to a special motion to strike because just days before the city council took up the issue of contract renewal, the defendant city had made statements to the plaintiff suggesting the defendant city had already decided not to renew the contract. (*Rand, supra*, 6 Cal.5th at p. 628.) The Supreme Court rejected that suggestion because the defendant city attorney's statements would not form the basis of a promissory fraud claim. (*Ibid.*) As to Bloom's statements made to representatives of the defendant city and the NFL, the Supreme Court

concluded they were more than "'merely a reference to a category of evidence that plaintiffs have to prove . . . their claims.'" (*Id.* at p. 629.) Instead, those communications formed the basis for and "constitute[d] the conduct by which plaintiffs claim to have been injured in their intentional interference claims." (*Id.* at pp. 629, 630.)

Jazz's communications with the associate planner and its permitting activities might somehow touch upon a matter of public interest, but that does not mean that Uptown's lawsuit, which is a commercial dispute over a private lease, is absorbed into the ambit of the anti-SLAPP statute. Those communications would not form the basis for Uptown's declaratory relief claim; Uptown does not allege those communications injured it or constituted a breach of the Lease.

Two reported decisions of the Court of Appeal lend support to our conclusion Uptown's claims do not arise from any activity claimed by Jazz to be protected under section 425.16(e). In *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790 (*Wang*), the plaintiffs sold two parcels of real property to the defendant for development as a Wal-Mart store and retained parcels adjoining the development. (*Id.* at p. 793.) The plaintiffs sued the defendant buyer, the city in which the property was located, and others, for breach of contract, fraud, and related causes of action. (*Id.* at pp. 793, 797-798.) The plaintiffs alleged, in essence, the defendants' actions in developing the parcels wrongfully denied street access to the parcels retained by the plaintiffs. (*Id.* at pp. 793, 797-798.) The complaint included allegations referring to the defendants' conduct in obtaining and issuing permits allowing the defendant to develop the property in a way that denied the plaintiffs street access. (*Id.* at pp. 796-797.)

The trial court granted the defendant's anti-SLAPP motion on the ground that all of the plaintiffs' causes of action arose from the development application, which was protected governmental petitioning activity. (*Wang, supra,* 153 Cal.App.4th at pp. 794, 799.) The Court of Appeal reversed and concluded none of the plaintiffs' causes of action arose out of protected activity. (*Id.* at pp. 794, 809-810.) The court started from

the proposition "[t]here is no bright-line rule that all cases involving developments and applications for public permits always involve the type of petitioning conduct protected by the anti-SLAPP statutory scheme." (*Id.* at p. 804.) The court agreed with the plaintiffs that their claims were not based on protected speech or conduct merely because the complaint referred to applications to the city for development permits. (*Id.* at p. 794.) Instead, "the [plaintiffs]' breach of contract, fraud, and related causes of action are factually based on allegations about the manner in which the private transactions between the parties were conducted, and the governmental development permit applications were only incidental or collateral to the principal purposes of those transactions." (*Ibid.*) Liability was premised, the court reasoned, on the improper manner in which the defendant carried out "business-related activities" as a developer in securing and implementing plans for the development project. (*Id.* at p. 808.) "Such alleged improper conduct does not arise from defendants' petitioning activities in pursuing the permits, but rather from its conduct in carrying out its contractual duties, seeking to extend escrow, requesting the execution of documents, and other practices within the scope of the parties' contractual relationship." (*Ibid.*)

Likewise here, Uptown's claim for declaratory relief is factually based on a private transaction—the Lease—between Uptown and Jazz and Jazz's conduct in carrying out its contractual duties. Uptown is not alleging Jazz acted improperly or committed breach of contract by communicating with the City about noise standards or by obtaining the necessary permits for the Sound Mitigation Plan.

In *Midland Pacific Building Corp. v. King* (2007) 157 Cal.App.4th 264, 267 (*Midland*) the defendants entered into a contract to sell 27 acres of real property to the plaintiff, a developer. As part of the contract, the defendants agreed to obtain, at their expense, approval of a specific plan and vesting tentative tract map that conformed substantially to a draft plan and a draft map. (*Ibid.*) The plaintiff's complaint alleged the defendants breached the contract by processing a high density tract map instead of a map

in substantial conformance with the draft map. (*Id.* at pp. 268-269.) The trial court denied the defendants' anti-SLAPP motion, and the Court of Appeal affirmed. (*Id.* at p. 267.)

The Court of Appeal concluded the plaintiff's breach of contract claim arose out of protected activity because "obtaining governmental approval was not collateral to the contract" but "was of the essence" of it. (*Midland, supra,* 157 Cal.App.4th at p. 273.) The contract expressly imposed on the defendants the obligation to obtain government approval; thus, "the actions that allegedly breached the contract necessarily and essentially constitute petitioning activity." (*Id.* at p. 273.) The court distinguished *Wang* on the ground the purpose of the contract in *Wang* was to allow the defendant to develop the property and obtaining government approval was collateral to that purpose. (*Ibid.*) The court affirmed the order denying the anti-SLAPP motion, however, because the plaintiff demonstrated a probability of prevailing on the merits. (*Id.* at p. 267.)

The *Midland* court confirmed "[t]he anti-SLAPP statute will not protect a developer from a complaint for breach of contract simply because the developer sought governmental permits for the activity that constitutes the breach." (*Midland, supra,* 157 Cal.App.4th at p. 273.) The anti-SLAPP statute thus does not protect Jazz simply because it communicated with the City about noise standards and sought and obtained permits for the Sound Mitigation Plan, which Uptown alleges was not performed in compliance with the Lease and the Seventh Lease Amendment. The purpose of the Seventh Lease Amendment was to implement sound mitigation measures; obtaining permits from the City was, unlike the map approvals in *Midland,* collateral to that purpose. The actions alleged to breach the Lease—failure to meet noise standards and to perform sound mitigation measures—did not "necessarily and essentially constitute petitioning activity." (*Midland, supra,* 157 Cal.App.4th at p. 273.)

C. *Cases Relied on by Jazz*

In support of its argument that Uptown's claims arise from conduct protected under section 425.16(e), Jazz relies on *Newport Harbor, supra,* 23 Cal.App.5th 28; *Golden Eagle Land Investment, L.P. v. Rancho Santa Fe Assn.* (2018) 19 Cal.App.5th 399 (*Golden Eagle*); *Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574 (*Okorie*); and *Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924 (*Bel Air*). None of those cases supports Jazz's position.

In *Newport Harbor* the trial court denied the defendant's anti-SLAPP motion to strike the claims in a complaint seeking a declaration of the parties' rights and obligations under a lease and related agreements. (*Newport Harbor, supra*, 23 Cal.App.5th at pp. 39-40.) In affirming in part and reversing in part, a panel of this court examined a number of allegations in the complaint to determine whether they asserted claims arising from protected activity. (*Id.* at pp. 44-48.) Many of the allegations did not arise from protected activity, merely provided context, or were evidence of the parties' disputes. (*Id.* at pp. 45-46.) Other allegations directly alleged, however, that the defendant breached the lease by engaging in protected activity such as issuing notices and letters preparatory to filing an unlawful detainer action and filing the unlawful detainer action itself. (*Id.* at p. 47.) Those allegations should have been stricken because they sought to impose liability against the defendant on the basis of protected conduct; that is, the protected activity itself was the activity constituting the alleged breach of the lease. (*Ibid.*)

Golden Eagle arose out of a developer's attempt to develop a parcel of real property. (*Golden Eagle, supra,* 19 Cal.App.5th at p. 408.) The developer sought land use approvals for the project from San Diego County and from the Rancho Santa Fe Association (the association). (*Id.* at pp. 405, 408-409.) After the project failed to obtain the necessary approvals, the developer sued the association on numerous statutory and tort theories, including interference with prospective economic advantage. (*Id.* at

pp. 405, 429.) The developer alleged the association engaged in various actions, including unauthorized discussion and actions in processing the requested approvals and in communicating with county officials, which amounted to bad faith opposition to the project. (*Id.* at pp. 405, 409.) The trial court granted the association's anti-SLAPP motion on all but one cause of action. (*Id.* at p. 412.)

The Court of Appeal concluded the anti-SLAPP motion should have been granted on all causes of action because all of the developer's claims arose from the protected activity of "sending letters and e-mails and setting agendas and conducting meetings, all in administering its covenant responsibilities in collaboration with the County's planning activities." (*Golden Eagle, supra,* 19 Cal.App.5th at pp. 425, 427.) As to the intentional interference claims, the court concluded "it is precisely such allegations of protected activity that [the developer] assert[s] as the grounds for [its] requested relief." (*Id.* at p. 430.)

In *Okorie,* the plaintiff, a school teacher, sued his employer, a public school district, for discrimination under the California Fair Employment and Housing Act and alleged that a series of incidents precipitated by the defendant caused him to suffer humiliation and embarrassment. (*Okorie, supra,* 14 Cal.App.4th at pp. 581-582.) In an anti-SLAPP motion, the defendant presented evidence that the gravamen of the plaintiff's complaint was conduct made as a precursor to or part of an internal investigation made in response to a molestation allegation against the plaintiff. (*Id.* at p. 583.) The trial court granted the anti-SLAPP motion, and the Court of Appeal affirmed. (*Id.* at p. 581.) The Court of Appeal concluded that internal investigations conducted by governmental agencies are protected activity under section 425.16(e) and that the protected conduct "formed the very basis of [the plaintiff's] demands for relief." (*Id.* at p. 595.) According to the complaint, the cause of the plaintiff's embarrassment and humiliation was not unprotected decisions by the defendant such as classroom reassignment. (*Ibid.*) Instead, "[t]he complaint makes clear that the primary cause for this humiliation and

embarrassment is [the defendant's] speech and communicative conduct related to the investigation." (*Ibid.*)

In *Bel Air, supra,* 20 Cal.App.5th 924, the plaintiff, a satellite television service provider, alleged the defendants, its former employees, interfered with its contractual relations with other employees by encouraging them to quit and sue the plaintiff for alleged employment violations. (*Id.* at pp. 929, 930.) The Court of Appeal reversed an order denying the defendants' anti-SLAPP motion. (*Id.* at p. 929.) In so doing, the court concluded the defendants' prelitigation conduct of encouraging other employees to quit and sue was protected under section 425.16(e) and that the plaintiff's claims arose directly out of that protected activity. (*Id.* at pp. 944-945.)

Jazz argues that in this case, as in *Newport Harbor*, *Golden Eagle*, *Okorie*, and *Bel Air*, the protected activity "is not incidental to" but is "the basis for" Uptown's claim. To the contrary, *Newport Harbor*, *Golden Eagle*, *Okorie*, and *Bel Air* illustrate why Uptown's claim for declaratory relief does not arise from the activity claimed to be protected. In each of those cases, the conduct constituting the protected activity was the very same activity that constituted the breach of contract or caused the tortious injury. Here, by contrast, Uptown does not allege the acts of communicating by email with the City's associate planner or of seeking and obtaining permits themselves constituted a breach of the Lease or the Seventh Lease Amendment.

DISPOSITION

The order denying the anti-SLAPP motion is affirmed. Respondent to recover its costs on appeal.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

GOETHALS, J.